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No. 85-382

In The
Supreme Court of the United States
October Term, 1985

DAVID HEGGY,
Petitioner,

vs.

CARL WELTY and SUSAN WELTY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

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QUESTIONS PRESENTED

Was the finding of fact by the Wisconsin Trial Court that the Respondents used due diligence to locate the Petitioner's post office address for mailing copies of the summons and complaint, arbitrary or capricious?

Do the facts that Respondents made extensive efforts including those of four process servers, to locate the Petitioner, constitute facts supporting the findings of due diligence by Respondents to locate Petitioner's post office address?

Where Respondents, after exercising due diligence to locate Petitioner personally, mailed copies of the summons and complaint to Petitioner's known residence, when the mailed summons and complaint were returned by the post office because Petitioner refused to accept mail at his residence and the Petitioner evaded the service of process, are there any facts to support the finding of due diligence to locate Petitioner's secret mailing address?

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SUPPLEMENTARY STATEMENT OF THE CASE

The Petitioner, David Heggy, has made many factual errors in his statement of the case, and has omitted many significant facts.

The facts set forth in this supplementary statement of the case are taken from the findings of fact contained in the memorandum decision made by the trial court, the Honorable J. Richard Long, Circuit Judge for Rock County, Wisconsin, Branch 5, dated April 6, 1984, and affirmed by the Wisconsin Court of Appeals. At the time the findings were made, the case was before the trial court for decision on the motion of David Heggy, then the defendant, to set aside the judgment entered by default in the action and to let him file and serve his answer and defend the action.

Since 1978, David Heggy resided next door to the Weltys in the only house that is on a street called Denture Lane on Highway X, Route 1, Beloit, Wisconsin, within the Town of Turtle, Rock County, Wisconsin, (A-51) as evidenced by the poll list of the Town of Turtle for the Spring election on April 5, 1983.

John Torphy, a deputy sheriff for Rock County for 13 years, beginning on July 29, 1983, made eleven attempts at different times of day to serve David Heggy with the summons and complaint in this action at his residence. He checked with other Town of Turtle officers and with other officers at the sheriff's department to see if they could give a further address, but he could learn no further address. Between August 29 and September 8, 1983, he made five more attempts to serve the summons and complaint personally on David Heggy. (A-54).

Joseph Sprecher a deputy sheriff for two and one half years knew Mr. Heggy and attempted twice to serve him at his home. Mr. Heggy had previously told Joseph Sprecher to knock on the door and step back from the door so Heggy could see who was at the door. (A-54). Joseph Sprecher knew of no other address for Mr. Heggy. (A-55).

Chadwick A. Kelley, a Rock County Deputy Sheriff for 16 years had previously in 1982 attempted unsuccessfully to serve Mr. Heggy at his residence. Officer Kelley had in 1982 gone to the office of the Town Clerk of the Town of Turtle and then to Varney Printers on Cross Street in Beloit. He there talked to the manager who told officer Kelley he had never heard of Heggy. Officer Kelley was unable to serve Heggy at the printing shop in 1982. He made several unsuccessful attempts to reach Heggy by phone in 1982. In this action Officer Kelley attempted three times unsuccessfully to serve Heggy at his residence. He knew of no other address for Mr. Heggy. (A-55).

Another Rock County Deputy Sheriff for 18 years, Jimmy Brandenberg who knew Mr. Heggy, unsuccessfully attempted three times to serve Mr. Heggy at his residence in December of 1983. Mr. Bradenberg learned of no other address for Heggy. (A-56).

The Respondent, Carl Welty, called his attorney Edward Grutzner each time he saw activity at the Heggy property: on August 1, 7, 16 and September 18, 1983, in order that Mr. Grutzner could alert the sheriff to serve Mr. Heggy. (A-56).

The trial court found that the Weltys exercised due diligence in attempting to serve the summons and complaint personally upon David Heggy. (A-56) (A-75).

At the time of the first publication of the summons on August 25, 1983, the Weltys mailed copies of the summons and complaint to David Heggy at the following four addresses:

P.O. Box 938, Beloit, WI 53511

Route 1, Denture Lane, Beloit, WI 53511

Route 1, Highway X, Beloit, Wisconsin 53511

Route 1, Box 250 Denture Lane, Beloit, Wisconsin 53511

These four addresses were all of the addresses then known to the Weltys and their attorneys. (A-57).

David Heggy refused to provide a mail receptacle at his home residence and, therefore, he did not and could not receive mail addressed to his residence. (A-57).

Mr. Heggy had used Post Office Box number 938 at Beloit, Wisconsin, but discontinued using that post office box in April or May of 1983. He did not leave a forwarding order for mail with the Beloit Post Office. (A-58).

David Heggy in 1983 used the four addresses to which the Weltys sent copies of the summons and complaint. (A-58).

Petitioner David Heggy for approximately two years had instructed certain people, but only certain people, to use a mailing address for him of 613 Cross Street, Beloit, Wisconsin, which was the street address of Varney Printers. David Heggy never lived at this address which was not a residence but a commercial printing establishment. (A-59).

Mail addressed to David Heggy at 613 Cross Street was placed in a box and was picked up every two weeks to one month by Mr. Heggy or every month to six weeks by David Carpenter, a person employed by Mr. Heggy. (A-60).

The Weltys received a package on November 26, 1983 postmarked from Minneapolis, Minnesota with a 613 Cross Street return address, which the Weltys believed to be fictitious. (A-60).

Copies of the summons and complaint sent by the Weltys to Mr. Heggy addressed to his residence were returned to the attorney for the Weltys marked:

> "Return to sender, not deliverable as addressed, no forwarding order on file, no receptacle to receive mail on Route 1, Denture Lane, P.O. Box closed." (A-60).

David Heggy testified that he received no mail addressed to him at any address nor did he have any telephone communication with anyone in the Beloit area from July 13, 1983 until January 9, 1984. (A-61).

The trial court found that the Weltys exercised due diligence in mailing copies of the summons and complaint to Petitioner. (A-62) (A-75).

The trial court found that Mr. Heggy was seen at his residence during the pendency of the action. (A-63) Miles Carlson, a near neighbor of Mr. Heggy, who had known David Heggy for many years, saw him the first half of October 1983, while jogging within a car length of David Heggy.

A Town of Turtle employee for eight years who knew Mr. Heggy for three or four years saw David Heggy after August 8, 1983 and before October 1983. They waved at

each other at a distance of 20 to 30 feet while the employee was on a slow moving vehicle. (A-64).

Another Town of Turtle highway department worker for fifteen years and who knew Mr. Heggy, saw David Heggy in August or early September of 1983, having passed within 20 yards of Heggy who was mowing his grass. (A-64).

David Heggy employed a caretaker named David Carpenter, who in about September of 1983, met with David Heggy and Suzanne Hall, a woman with whom Heggy had lived for several years. Mr. Carpenter told David Heggy and Ms. Hall of the pending lawsuit brought against David Heggy by the Weltys. Suzanne Hall said, "Yes, we know about it." David Heggy was present then, heard that conversation and did not deny the response given by Suzanne Hall. (A-66).

John Borgerding, a Beloit attorney who then represented Mr. Heggy in other matters, wrote about the lawsuit to David Heggy on October 25, 1983. He addressed the envelope to David Heggy at 613 Cross Street, Beloit, Wisconsin, in care of Varney Printers. (A-67). Mr. Borgerding never received the letter back. That letter read in part: "You have been sued by Welty for a total of $500,000, for the alleged harassing things he claims you did." (A-67).

The trial court found David Heggy had intentionally evaded service of the summons and the complaint in the action at his residence in Wisconsin. (A-67)

On Aug[illegible] 16, 1983, colorful woman's clothing was on the Heggy clothesline which the caretaker did not place there. (A-69).

however, that Petitioner did not raise the federal questions, sought now to be raised, in the trial court.

Petitioner stated to the trial court:

"Because the trial court was without jurisdiction over Heggy due to the failure of Weltys to exercise due diligence to ascertain Heggy's post office and mail a copy of the summons and complaint to his post office address at or immediately prior to the first publication of the summons, Heggy respectfully moves the court to vacate the judgment. . ."

Petitioner did not raise the issue of due process in either of his briefs filed in support of his motion to vacate the default judgment.

In his oral argument April 6, 1984 in support of the motion to vacate the judgment, counsel for Heggy did not present any issue of due process. He did argue: " . . . the service by publication in order to be legal must have had the plaintiff using due diligence to ascertain the post office address of the defendant."

The trial court understood:

> "The defendant's motion has been brought pursuant to, and I realize solely upon the provisions of Section 806.07(1)(h) of the Wisconsin Statutes and not upon section 806.07(1)(a) of the statutes as has been stated and agreed to by counsel and the Court." (A-86)

The Wisconsin Statute reads as follows:

> "806.07 Relief from judgment or order. (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> (a) Mistake, inadvertence, surprise, excusable neglect; . . . .

(d) The judgment is void; . . .

(h) Any *other* reason justifying relief from the operation of the judgment." [emphasis added]

The trial court understood that the motion to vacate was based solely upon the allegation that Weltys failed to exercise due diligence to ascertain the post office address of Heggy.

Respondents' 85 page brief submitted to the trial court contained quotations from 62 Am Jur 2d "Process" "Generally," section 69, which read in part:

> "If actual service is impracticable nothing more is essential to the due process of law than the service provided for be such as in the exercise of legislative discretion shall have been found most suitable to accomplish the purpose of actual service."

The brief made two other references to "due process". Weltys made no argument regarding due process, but cited the law in support of their position that service was made in a manner such that:

> "The reasonable probabilities were that the defendant would receive notice."

This inclusion in the *Weltys* brief of a reference to due process does not constitute a raising of that issue by the *Petitioner* David Heggy. Nor does the trial court's repetition of that citation from American Jurisprudence in a statement made February 1, 1984 to counsel prior to briefing constitute a passing upon the due process issue.

The constitutional issue was neither raised, nor briefed nor decided in the trial court.

Petitioner in his brief filed with the Wisconsin Court of Appeals did claim there was a denial of due process.

The Weltys in their reply brief before the Appellate Court replied only that this issue was raised for the first time on appeal and thus appellant waived his right to that argument. Thus the issue of due process was not briefed on appeal by the Weltys.

The Court of Appeals in its decision held:

> "The defendant contends here for the first time that plaintiffs' attempts at service fell short of due process standards. . . ." (A-16) . . . . Under these circumstances we decline to address the defendant's constitutional argument." (A-18)

In his brief to the Wisconsin Supreme Court, the entire due process argument of counsel for Heggy after citation of law was:

> "Instant record indicates that plaintiffs did not truly desire to give actual notice of the suit to defendant, and in fact, prior to trial were concerned lest he learn of it (Exh. 94, p. 46). Clearly due process was denied defendant."

The Respondents in their brief to the Wisconsin Supreme Court, did not respond to the due process argument except to say:

> "Heggy's assertion that the Weltys did not in good faith try to serve him is unsupported by the record."

The Petitioner engages in hyperbole when he argues that the trial court decided the constitutional issues. One reads the findings of the trial court at pages 49-87 of the appendix, in vain for a finding of fact or conclusion of law regarding due process or the constitutional question.

Even more difficult to follow is Petitioner's argument that the Court of Appeals actually decided the constitutional issue, when that court specifically stated:

> "Neither compelling reasons nor the interest of justice require us to address defendant's constitutional claim, and we therefore decline to address it." (A-18)

II. NO FEDERAL QUESTION EXISTS FOR REVIEW BY THE UNITED STATES SUPREME COURT BECAUSE PETITIONER'S CHALLENGE IS TO THE COURT'S FINDING OF FACT OF REASONABLE DILIGENCE, WHICH FINDING IS NOT CLEARLY ERRONEOUS AND IS SUPPORTED BY SUBSTANTIVE EVIDENCE.

The Wisconsin Court of Appeals observed:

> "Defendant's constitutional argument is essentially an attack on plaintiffs' reasonable diligence which we have already resolved in plaintiffs' favor insofar as sec. 801.11 (1) Stats. requires it." (A-18)

> "The supreme court has treated 'reasonable diligence' as a finding of fact to be affirmed unless against the great weight and clear preponderance of the evidence," [citations omitted] "this test is essentially the same as the clearly erroneous standard of sec. 805.17 (2), Stats., which we now apply to findings made by the court." (A-7)

The Wisconsin Court of Appeals then thoroughly reviewed the facts in the case and affirmed all the relevant findings of fact made by the trial court, ruling that they were not clearly erroneous. (A-10 to A-16).

The fourteenth amendment to the United States Constitution does not, in guaranteeing due process of law, assure immunity from judicial error.

> *Stein v. New York,* 346 US 156, 97 L Ed 1522, 73 S Ct 1077, reh den 346 US 842, 98 L ED 362, 74 S Ct 13 and (overld on other grounds *Jackson v. Denno,* 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 28 Ohio Ops 2d 177, 1 ALR3d 1205).

"The Fourteenth Amendment is not a guaranty that a trial shall be free from error; to constitute a taking of property without due process of law by force of a judgment in such proceedings, such error must be gross and obvious, coming close to the boundary of arbitrary action." *Roberts v. New York City,* 295 US 264, 79 L Ed 1429, 55 S Ct 689.

> "The Federal Supreme Court cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power. . . ." 16 A Am Jur 2d Constitutional Law section 820. *American R. Express Co. v. Kentucky,* 273 US 269, 71 L Ed 639, 47 S Ct 353; *Corrigan v. Buckley,* 271 US 323, 70 L Ed 969, 46 S Ct 521; *West v. Louisiana,* 194 US 258, 48 L Ed 965, 24 S Ct 650 (ovrld on other grounds *Pointer v. Texas,* 380 US 400, 13 L Ed 2d 923, 85 S Ct 1065); *Ladner v Siegel,* 298 Pa 487, 148 A 699, 68 ALR 1172.

In *Bell Telephone Co. v. Pennsylvania Public U. Com'n,* 309 US 30, 60 S Ct 411, 412 L Ed (1940) in a per curiam decision, the court stated:

> "In the absences of other constitutional objections, it cannot be said that a State Court denies due process when on appropriate hearing it determines that there is *evidence to sustain a finding.* . . . The contention that such a decision is erroneous does not present a federal question." [citations ommitted] [Emphasis added.]

The trial court made a painstaking analysis of the evidence presented at the motion to vacate the judgment. His review of the applicable law was scholarly. The

court's findings of fact and conclusions of law were detailed. Such judicial work may not be characterized as arbitrary or capricious. The Court of Appeals' decision in sustaining the trial court's findings relating to reasonable diligence, indicates a careful and accurate analysis of the record.

No federal question exists because the findings of due diligence were amply supported by the evidence and were not clearly erroneous. The case of *Barr v. City of Columbia,* 84 S Ct 1734, 1736, 378 U.S. 146, 12 L Ed 2d 766, cited by Petitioner, is a good example of a case where the Supreme Court found a violation of the due process clause of the constitution because the state court decision was arbitrary. In that case in 1964 five negro students were convicted in South Carolina for criminal trespass and breach of the peace where they sat at a lunch counter at which the policy was to serve whites only. The Supreme Court granting certiorari held that "there is a complete and utter lack of any evidence and no suggestion in the opinions of any of the courts below, that any of the petitioners did anything disorderly or did anything other than politely ask for service."

Mr. Justice Holmes in the case of *Chicago L. Ins. Co. v. Cherry,* 244 US 25, 61 L Ed 966, 37 S Ct 492, 493 (1917) said:

> "Whenever a wrong judgment is entered against a Defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights."

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 US 673, 74 L Ed 1107, 50 S Ct 451.

In *Corrigan v. Buckley,* 271 US 323, 70 L Ed 969, 46 S Ct 521, 524 (1926), the court stated:

> ". . . . there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation." [citation omitted] Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law."

See also: *American R. Express Co. v. Commonwealth of Kentucky,* 273 US 269, 71 L Ed 639, 47 S Ct 353.

In 1939 speaking in the case of *Roberts v. City of New York,* 295 US 264, 79 L Ed 1429, 55 S Ct 689, Justice Cardozo said:

> " 'If there has been any wrong done it is due not to the statute, but to the courts having made a mistake as to evidence, or at most as to the measure of damages.' *McGovern v. City of New York,* 229 US 363, 370, 33 S Ct 876, 57 L Ed 1228, 46 L.R.A. (N.S.) 391 Not every such mistake amounts to a denial of constitutional immunities though the outcome is to give the owner less than he ought to have. In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guarantee that a trial shall be devoid of error. *West Ohio Gas Co. v. The Public Utilities Commission,* 294 US 63, 70, 55 S Ct 316, 79 L Ed 761. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the border of arbitrary action."

See also 16C Corpus Juris Secundum: Constitutional Law, General Considerations, Section 964.

Where extensive efforts were made to find and serve the defendant personally, further inquiry is not required where the plaintiff has already mailed the summons and complaint to the defendant's known residence.

The question is annotated at 62 Am Jur 2d, Process, Section 117—"Sufficiency as to diligence to ascertain defendant's whereabouts."

There was substantial evidence to sustain the finding of due diligence. The United States Supreme Court should not exercise its supervisory power because the finding was not arbitrary or capricious.

Respondents request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

The following are corrections of errors made in the Petitioner's appendix. All errors have not been corrected —only those which are significant to the Respondents' position.

At page A-12 the Petitioner has set forth the decision of the Wisconsin Court of Appeals in this case. Within that decision the Court of Appeals is quoting the relevant Wisconsin Statute Section 801.11(1)(c). The Petitioner omitted the words:

"by publication of the summons as a class 3 notice."

The corrected quotation reads:

> "If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the summons as a class 3 notice under ch. 985, and by mailing."

At page A-18 the Petitioner has set forth the decision of the Wisconsin Court of Appeals. The two omitted words "have" and "and" are underlined in the correct quotation below.

> "Neither compelling reasons nor the interest of justice require us to address defendant's constitutional claim, and we therefore decline to address it. Defendant's constitutional argument is essentially an attack on plaintiffs' reasonable diligence which we *have* already resolved in plaintiffs' favor insofar as sec. 801.11(1), Stats., requires it. The defendant was found to have actual notice of the action *and* to have purposely avoided service. Testimony in the record supports these findings, which are not clearly erroneous. Under these circumstances we decline to address the defendant's constitutional argument.

At page A-33 Petitioner has set forth the judgment of the Circuit Court dated December 10, 1983. The Petitioner has omitted the word "evidence".

The corrected paragraph reads as follows:

> "The court has taken testimony of the plaintiffs by default on December 7 and December 9, 1983. Plaintiffs have filed their brief of the law. Exhibits were received in *evidence* and counsel for the plaintiffs have argued their case to the court. The court has filed its findings of fact and conclusions of law in which it is directed that judgment be entered accordingly."

At page A-90 Petitioner has set forth excerpts from the February 1, 1984 Hearing on Motion to Vacate. The court stated to counsel prior to their briefing regarding the motion to vacate the default judgment:

> "I would like to direct your attention to Vol. 62 of American Jurisprudence 2d under the heading Process, Sec. 69 and I will read just briefly from that."
>
> (At page A-92)
>
> "And then from Section 71 which is headed 'Effect of defendant's absence from state.'"

The error was made by the typist for the trial court. The correct sentence as it is stated in American Jurisprudence reads:

> "However, it is *now* quite generally recognized that the fact that the defendant was without the state at the time of the substituted service by leaving a copy of the summons at his usual place of abode in the state does not invalidate the service for the purpose of the rendition of a judgment in personam." [Emphasis added]

The transcript of the court's statement reads "not" and the appendix filed by Petitioner reads "not."

Testimony of Susan Welty, February 1, 1984, at page 119:

"Q. And until January of this year did you know of any address of where Mr. Heggy lived other than at the Denture Lane address?

"A. No.

"Q. Did you know when you received the package with an address of 631 Cross Street what was at 631 Cross Street?

"A. No.

"Q. Did you ever learn that David Heggy lived there?

"A. No."

Testimony of David Heggy, February 1, 1984, at pages 158 and 159.

"Q. I'll refer, sir, to Exhibit #1 which was sent to David Heggy Post Office Box 938, Beloit, Wisconsin, did you at one time have that post office box?

"A. Yes.

"Q. And when did you discontinue that?

"A. Maybe April, May of '83. That's a rough—

"Q. Why did you discontinue that?

"A. Well, I had a little squabble with the post office department and also it was costing $600 for every 10 years and I found it more convenient and cheaper way to do it.

"Q. Now, that Exhibit #1 was returned marked Route 1, Box 250, Denture Lane, Beloit, Wisconsin. Did you ever use that post office box?

"A. Box 250 I'm not familiar with. Never used it.

"Q. That exhibit was marked return to sender, not deliverable as addressed. No forwarding order on

file. Why did you not have a forwarding order on file with the post office, Mr. Heggy?

"A. Because Suzanne Hall had had some, oh, with her parents she had some disagreements and she was in a mood to break the connection with them and so we when she took care of that she didn't make a forwarding address and it was also another way to terminate the junk mail we have been receiving.

"Q. Well, specifically what was the reason that you did not leave a forwarding address, Mr. Heggy?

"A. Suzanne Hall took care of it and that was agreeable that she not leave a forwarding address. I just merely notified who needed to know.

"Q. Well, I understand why she changed it and left no forwarding address. But was there any specific reason why you did not leave a forwarding address?

"A. Get rid of the junk mail. You get on a list and you get junk forever. This is a way to get a fresh start with the junk mail."